

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2019-281-S

IN RE:)	MOTION TO STRIKE PORTIONS
)	OF THE PRE-FILED DIRECT
Application of Palmetto Utilities, Inc. for)	TESTIMONY AND EXHIBITS OF
adjustment of rates and charges for, and)	CHARLES E. LOY, DANIEL P.
modification to certain terms and conditions)	HUNNELL, II, AND CHRISTINA L.
related to the provision of sewer service.)	SEALE AND FOR IMPOSITION OF
)	SANCTIONS

Applicant Palmetto Utilities, Inc. (“PUI”) hereby moves the Public Service Commission of South Carolina (“Commission”) for an order striking certain portions of the direct testimony and exhibits of Charles E. Loy, Daniel P. Hunnell, II, and Christina L. Seale filed May 26, 2020, by the South Carolina Office of Regulatory Staff (“ORS”) in the above-captioned Application (the “Rate Case”) referencing or incorporating books, records or other information provided by PUI to ORS pursuant to §58-4-55(A) -- on the grounds that they were improperly disclosed to the Commission and public by ORS in violation of such statute.¹

In addition, PUI moves that the Commission sanction ORS for its violation of such statute by requiring that ORS reimburse PUI (a) the expenses of this motion, including a reasonable attorney fee and (b) the fees and charges heretofore paid by PUI to Mr. Loy’s firm pursuant to S.C. Code Ann. §58-4-100 from and after the filing of this Rate Case, thereby protecting PUI’s customers from bearing the burden of unnecessary or improper expenses caused by ORS’s statutory violations. This motion is made pursuant to S.C. Code Ann. §§58-3-225(C) and 58-3-

¹ In addition to the instant motion, PUI will also be filing a return in opposition to ORS’s untimely May 27, 2020, motion for leave to file with the Commission “under seal” **portions** of the direct pre-filed testimony and exhibits of ORS Senior Regulatory Analyst and witness Daniel P. Hunnell, II, which were already submitted to the Commission and served upon the parties of record on May 26, 2020, in contravention of §58-4-55(A) (“PUI Return”). As stated below, in view of the impending June 9 deadline within which it must pre-file its rebuttal testimony, PUI seeks leave to file additional rebuttal testimony as to the portions of Mr. Loy’s, Ms. Seale’s, and Mr. Hunnell’s direct testimonies which are the subject of this Motion and a sanction prohibiting ORS from filing any surrebuttal in that regard.. By submitting initial rebuttal testimony, however, PUI does not waive, but specifically reserves, its rights under this Motion and its opposition to the ORS motion.

250(2), S.C. Code Ann. Regs. 103-829(A), 103-835, and 103-846, and Rules 26(c) and 37(a) SCRCP.

INTRODUCTION

This motion requests relief from egregious conduct on the part of ORS in refusing to address overreaching by its staff in pursuing demands for production of books, records, and other information from a public utility in a contested case, and then compounding that refusal by allowing its witnesses to improperly disclose to the Commission and other parties of record selective parts of that production in direct violation of §58-4-55(A). Whether intentional or negligent, ORS's conduct should not be countenanced by the Commission: the offending portions of the pre-filed testimonies and exhibits of three of its witnesses should be stricken, and sanctions imposed.

FACTS

In the course of PUI's Rate Case, ORS has issued to PUI a total of four hundred sixteen (416) separate demands (including subparts) for the production of books, records, and other information pursuant to §58-4-55(A).² Of these 416 demands for production, ORS witness Hunnell alone submitted one hundred seventy (170) such demands under the title "Water Operations Requests." *See* Mot. Ex. A, ¶3.³ PUI responded to each and every such demand – often within five (5) business days of their issuance -- and at no point has ORS asserted to PUI that the books, records and other information do not "disclose full and accurate information." *Id.*, ¶¶ 4, 6. Moreover, even though Commission Order No. 2020-259 in this docket stayed all proceedings, ORS continued to issue demands that PUI produce books, records, and other information to ORS under §58-4-55, which demands PUI met. *Id.*, ¶ 7. ORS has not moved this Commission for any (i) order finding that PUI's production was not entitled to protection from public disclosure under

² *See* Affidavit of Lauren B. Hutson, June 1, 2020, copy attached hereto and incorporated herein by reference as Motion Exhibit "A."

³ The number, scope and substance of Mr. Hunnell's first one hundred fourteen (114) demands on behalf of ORS were brought to the attention of ORS's Executive Director and its staff in this matter at a meeting conducted in ORS's offices on February 19, 2020. *See* Motion Ex. A, ¶ 4. Rather than addressing the issue in a manner consistent with its obligations to facilitate resolutions or act directly or indirectly to resolve disputed issues in matters before the Commission, *see* S.C. Code Ann. §58-4-50(9), ORS permitted Mr. Hunnell to thereafter issue an additional fifty-six (56) demands for production on its behalf. It is therefore perhaps unsurprising that Mr. Hunnell was not properly supervised with respect to the content of his pre-filed direct testimony and exhibits. *Cf.* S.C. Code Ann. §58-4-20(A).

§58-4-55(A) or (ii) ruling on PUI's objections to certain of these demands as permitted under S.C. Code Ann. §58-4-55(B)(2). Accordingly, all books, records, and other information produced by PUI to ORS in this matter are confidential, proprietary, and exempt from public disclosure as a matter of law, in addition to being unchallenged.

Notwithstanding the foregoing, on May 26, 2020, ORS pre-filed with the Commission and served on all parties of record, direct testimony and exhibits of Mr. Loy, Mr. Hunnell and Ms. Seale which selectively discuss, describe, reproduce, reference or attach copies of PUI's books, records and other information produced to ORS pursuant to §58-4-55.⁴ Through Mr. Hunnell's and Mr. Loy's improperly filed testimonies and exhibits, ORS seeks to advance the patently specious claim that objections made by PUI in its responses to demands for production made under §58-4-55(A) hindered ORS in its ability to conduct the audit, examination, and inspection in this case. *See, e.g.*, Hunnell Direct Pre-filed Testimony, p.20, ll.5 – 18, Loy Direct Pre-filed Testimony at 18, ll. 15-22 and Exh. CEL-7.

LAW

Although ORS is statutorily entitled to demand the production of books, records and other information of public utilities in the context of a contested case proceeding, its authority to do so is not unbounded. A public utility is entitled to object to such demands under §58-4-55(B)(2), which then places upon ORS the onus of seeking relief from the Commission "in the same manner in which it addresses objections to discovery issued by the parties to the contested case proceeding."⁵ That manner is a motion to compel which ORS may submit pursuant to R. 103-835

⁴ *See* Loy pre-filed Direct Testimony p. 6, l.2 – p. 7, l.22 and related footnotes 7, 8, and 9; p. 12, l.14 – p. 13, l.2 and related footnote 12; p. 18, ll.15 – 22, and proposed Exhibit CEL-7. *See* Hunnell pre-filed Direct Testimony p. 5, l.22 – p. 6, l. 3.; p.7, ll. 9-10; p.7, l.19 – p. 8, l.2; p. 8, ll. 15-19 and related footnote; p. 11, l.1 and Exh. DPH-7; p.12, ll. 1-6 and related footnote; p. 17, n.10; p. 19, ll. 9-15; p. 20, ll. 5-14; p. 22, ll. 3-5, and proposed Exhibits DPH 9, 10, and 11. *See* Seale pre-filed Direct Testimony p. 7, l. 22 – p. 8, l.17; p. 8, l.19 – p.9, l. 3; and p. 9, ll. 12-19.

⁵ Despite the suggestion made in Mr. Hunnell's testimony and in ORS's motion to file portions of same under seal, demands for production by ORS under §58-4-55 are not discovery. This is made abundantly clear by S.C. Code Ann. §58-4-55(D). And it is not a distinction without a difference as any discovery served by ORS in a rate case proceeding is required to be filed with the Commission under S.C. Code Regs. 103-833 and under S.C. Code Regs. 103-835 can only be issued consonant with the provision of the South Carolina Rules of Civil Procedure, including Rule 11(a), SCRPC, and can be entered into evidence under Rule 26(d) and (g)(1), SCRPC. By contrast, there is no provision of §58-4-55(A) which permits the introduction of books, records or information into evidence. To the contrary, the confidentiality requirements of the statute contemplates the exact opposite. Further, the matters which may be discoverable under R. 103-833 and R. 103-835 and the SCRPC are far broader than that which ORS may demand be

and Rule 37, SCRCP. Further, ORS is expressly proscribed from disclosing books, records or other information so produced unless authorized to do so by the Commission under §58-4-55(A). While ORS and its “state agency personnel” are permitted to “zealously fulfill their responsibility” in contested case proceedings, they are also required to be “constantly cognizant of their duty ... to do so with equity and integrity.” *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003). In discharging its statutory duties in contested cases involving rate relief applications of public utilities, ORS may not take “an unprofessional approach to the legitimate financial interests of South Carolina businesses”⁶ and is required to “provide public utilities a fair rate application proceeding, and make appropriate and reliable recommendations to the [C]ommission.” *Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019). “When ORS fails to meet this responsibility, it necessarily affects the decision-making of the [C]ommission” if that failure is left unaddressed. *Id.* And such a failure amounts to “misconduct” on the part of ORS. *Id.* The Commission is authorized to impose sanctions. *See* S.C. Code Ann. §58-3-250(A)(2). *Cf.* R. 103-835 and Rules 26(c) and 37, SCRCP. In addition to monetary sanctions, the Commission may also preclude the introduction of evidence under R. 103-846 and Rule 37(b)(2)(B), SCRCP. *Cf. Kramer v. Kramer*, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996) (holding that “trial courts can impose sanctions upon parties who violate [discovery rules], including the exclusion of witnesses”). PUI submits that both types of sanctions are appropriate under the circumstances described above and are required in this instance in order to avoid ORS’s misconduct from depriving PUI of “a fair rate application proceeding” and improperly “affect[ing] [the Commission’s] decision-making in this proceeding.” *Daufuskie, supra*.

ARGUMENT

If ORS had any issue with PUI’s responses to demands for production of books, records, or information under §58-4-55(A), it was incumbent upon ORS to raise that matter by way of a

produced under the statute. *Compare* Rule 26 (b)(1), SCRCP (“[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action ... [even if] it will be inadmissible at the trial”) and § 58-4-50(A)(2) (“[t]he regulatory staff ... may require the production of books, records or other information”).

⁶ One such legitimate financial interest is that which ORS is mandated to preserve, i.e., “continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.” *See* S.C. Code Ann. §58-4-10(B).

motion to compel under Rule 37(a), SCRCF, in accordance with the procedures outline in §58-4-55(C). Rather than doing that, ORS improperly asserts in the direct testimony of two of its witnesses that PUI's responses were insufficient and in the course of so asserting, directly contravened the explicit directive of the General Assembly that the books, records, and other information produced to it by PUI in this proceeding be accorded confidentiality and protected from public disclosure unless and until ruled otherwise by the Commission. By its pre-filing and service of Mr. Loy's, Ms. Seale's and Mr. Hunnell's direct testimony and exhibits, ORS has blatantly violated the law governing public disclosure of books, records, and other information produced to it by PUI pursuant to §58-4-55, and ignored the Commission's role in determining matters within the ambit of that statute.

Moreover, Mr. Loy's and Mr. Hunnell's testimonies amount to an improper legal argument pertaining to PUI's **unchallenged** objections to ORS's improper demands under §58-4-55(A) seeking, *inter alia*, explanations of the meaning of the pre-filed testimony of PUI witnesses. None of the explanations sought by ORS would constitute "books, records or other information" of PUI, and much of it would constitute attorney work product.⁷ And if PUI's objections constituted an insufficient response, ORS had the ability to require PUI's officers, accountants, or other agents to give testimony under oath pursuant to S.C. Code Ann. §58-4-55(A). Or ORS could have raised the propriety of these objections in a motion to the Commission under §58-4-55(B)(2) to compel responses by PUI. It did neither, which is evidence that ORS either (i) believed that it had no valid basis to demand this production or to challenge PUI's objections or (ii) determined that the requested information was in fact immaterial or unnecessary.

This is not the first time that ORS has, after benefitting from concessions by a utility with respect to pre-filed testimony deadlines, attempted to cast as insufficient a utility's responses to demands for production under §58-4-55. *See* Commission Order No. 2018-78, issued October 30, 2018, in Docket No. 2018-2-E. ("ORS complains that 'SCE&G failed to cooperate by providing

⁷ Although also violative of the statute, Ms. Seale's testimony at least does not make the wholly unfounded assertion or suggestion made by Mr. Loy and Mr. Hunnell that PUI did not properly respond to ORS's demands under §58-4-55 and that its objections somehow hindered ORS in its examination and audit. To the contrary, Ms. Seale's testimony reflects that PUI was responsive to all of the demands for production made by ORS which she recites. Nonetheless, this testimony is still improper under the statute. And, of course, PUI disagrees with Ms. Seale's proposed adjustment discussed in this part of her testimony – which could have been proposed without revealing any of the information produced by PUI under §58-4-55(A) as is the case with the other adjustments proposed by Ms. Seale.

complete and reliable data in a timely manner.’’ *Id.* at 3.) However, as the Commission ruled in that instance, ORS had the ability to move to compel the utility to respond but did not do so. *Id.* The Commission’s ruling in Order No. 2018-78 was buttressed by the fact that ORS and the other parties in that case had received the benefit of concessions by the utility not only with respect to the timing of “discovery” responses by the utility, but also extensions of time within which the non-utility parties could pre-file their direct testimonies. *Id.* In the instant case, due to the stay, ORS had seventy-seven (77) days after it received PUI’s direct testimony before it had to pre-file its direct testimony. More importantly for purposes of this motion, ORS had sixty (60) days after it received PUI’s response to the “Water Operations Request #28” containing seventeen (17) separate demands (*see* Loy pre-filed Exhibit CEL-7, Mot. Ex. A, ¶5) within which it could have taken action under §58-4-55 to challenge PUI’s objections. Yet, ORS did nothing, eschewed the statutory vehicle by which it could have raised any issue it had with PUI’s objections to its demands, and then violated the statutory provisions protecting PUI in order to unilaterally overcome its failure to address the issue via the proper statutory framework involving review and consideration of the matter by this Commission.

Finally, the **selective** (but improper) attachment of certain of PUI’s responses to ORS’s demands for production under §58-4-55(A) as testimony exhibits, reveals an intent by ORS to deprive PUI of the equitable treatment it is entitled to under *Peake, supra*, and potentially an intent to mislead the Commission. This aspect of ORS’s misconduct is clearly demonstrated in the PUI Return, which return is incorporated herein by reference. In circumstances where ORS believes that disclosure (even though improper) of PUI’s production under §58-4-55(A) serves ORS’s purposes, it *attaches* the requests and responses. However, if that production does not support (or conflicts with) his testimony, Mr. Hunnell *describes* PUI’s written responses to an ORS demand for production (but does not attach them as an exhibit). This must be intentional – to avoid disclosure of the fact that his testimony is inaccurate. *See* PUI Return at 8-9 and Return Exhibit “A.” This is hardly conduct that can fairly be characterized as displaying integrity and equity. *Peake, supra*.

PROPOSED SANCTIONS

At bottom, ORS’s conduct violates a plethora of its legal obligations, including those arising under §58-4-10(B), §58-4-55(A), *Peake*, and *Daufuskie, supra*. The outcome here should be more severe than a simple rejection of ORS’s backdoor (and, here, false) effort to portray itself

as the victim of an uncooperative utility as was the result in Docket No. 2018-2-E. ORS chose to disregard the law and prejudice PUI by unlawfully airing its putative concerns regarding PUI's production under the statute in Mr. Loy's and Mr. Hunnell's pre-filed testimonies -- (i) knowing full well the applicable law precluded disclosure of books, records and information provided by PUI under §58-4-55, (ii) having had ample time to raise any issues with respect to the sufficiency of PUI's responses or the propriety of its objections under this same statute, and (iii) having had two months to both prepare its pre-filed testimony regarding the matters (improperly) raised in the pre-filed direct testimony of its witnesses, and to seek an order from the Commission enabling it to publicly disclose statutorily protected information. Whether it was retaliation for PUI's expressed concerns (see Motion Exhibit "A") regarding the production demands submitted by Mr. Hunnell, *Daufuskie, supra*, or negligent supervision of its employees, this ORS misconduct should not be countenanced by the Commission. It should therefore not only strike the improper testimony and/or exhibits of ORS witnesses Loy, Hunnell, and Seale, but also (i) award PUI the costs of this motion including a reasonable attorneys fee in an amount to be determined by the Commission, (ii) require that ORS reimburse PUI the \$36,851.25 heretofore paid by it to Mr. Loy's employer, GDS Associates, Inc., for services provided by Mr. Loy to ORS after the filing of the Rate Case, and (iii) relieve PUI of the obligation to pay any further fees charged by GDS Associates, Inc. to ORS in this matter, including the \$3,415 invoiced to ORS on May 20, 2020. *See* Motion Ex. A, ¶ 8.⁸ Should the Commission determine that the testimony and exhibits will not be stricken, PUI alternatively requests that it be permitted to pre-file additional rebuttal testimony and exhibits responsive to the portions of the direct testimonies and exhibits of ORS witnesses, Loy, Hunnell, and Seale described above, on June 23, 2020 – one week from the date upon which ORS's surrebuttal testimony is due -- and that ORS be prohibited from submitting any surrebuttal

⁸ Unless the Commission requires that ORS bear the cost of this Motion and the services of GDS Associates, Inc., these will be passed on to PUI's ratepayers in the form of rate case expense and under S.C. Code Ann. §58-4-100. PUI respectfully submits that such an outcome would simply insulate ORS from its clear misconduct and provide absolutely no deterrent from it engaging in further misconduct in the future. *Cf. Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 512 S.E.2d 510, 524 (Ct. App. 1998) (holding that "sanctions are imposed 'to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent'"). (Internal citations omitted.) If ORS's misconduct is not addressed, it "decreases the likelihood of [it] being deterred from similar conduct" in the future. *Id.*

testimony or other evidence with respect to the testimony to be filed by PUI on that date.⁹ “The opportunity to present surrebuttal evidence is discretionary with the Commission.” *Palmetto Alliance, Inc. v. South Carolina Public Service Commission*, 282 S.C. 430, 439, 319 S.E.2d 695, 700 (1984). PUI submits that, under these circumstances, an exclusion of surrebuttal testimony or other evidence responding to additional rebuttal by PUI is a proper and warranted exercise of the Commission’s discretion as it is supported by the law (*Kramer, supra*) and the foregoing facts. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006).

CONCLUSION

Based on the foregoing, PUI respectfully moves that this motion to strike and award sanctions against ORS be granted.

Respectfully submitted,

s/John M. S. Hoefer _____
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Columbia, South Carolina
 This 5th day of June, 2020

⁹ PUI hastens to add that it does not seek any postponement of the hearings scheduled in this matter and submits that the current procedural schedule should not otherwise be altered, particularly in view of the fact that PUI not only voluntarily waived its rights under S.C. Code Ann. §58-5-240(C) but also requested a sixty (60) day stay in part due to a (now demonstratively naïve) belief that a settlement could be achieved in this matter as is encouraged by law. *See* S.C. Code Ann. §58-4-50(9).